no circumstances the application for the licence and its approval could be held to have created contractual rights and obligations between the applicant and the licensing authority.

In this case in so far as the plaintiffs' claim was based on contract it must fail, but their statement of claim did not so specify and was wide enough to cover whatever right or interest created by the grant or intended grant of a licence. Paragraph 7 of their amended statement of claim said:

"On or about January 18, 1979, the defendants wrongfully and in breach of the said approval cancelled the said approval as per letter Bil. 2(2) dlm. PANT 34 5."

This paragraph is wide enough to cover other grounds as well. It is clear that the plaintiffs had spent $21,700 because of the approval. The subsequent cancellation of the approval had wasted all these expenses and justice demands that compensation should be given therefor. The case therefore falls squarely within the principle of equity arising out of the expenditure of money commonly referred to as equitable estoppel. This principle was fully discussed in the Federal Court's Judgment delivered by me in *Mok Deng Chee* v. *Yap See Hoi & Ors.*[1] For the purpose of the present case it is sufficient for me to say that where an applicant for a licence had expended money on the strength of a letter conveying approval of his application for a licence, the licensing authority is not free to refuse to issue the licence or to terminate the approval without compensating the loss incurred by the applicant. That being the case, I hold that the plaintiffs were entitled to recover the sum of $21,700 which they had expended because of the approval. But as regards their claim for loss of profit, there was absolutely no basis either in fact or in law, since there was no evidence that they lost any profit and also since the case was not one of breach of contract. Hence I dismissed their claim for loss of profit amounting to $150,000.

Finally I entered the judgment for the plaintiffs in the sum of $21,700 only and costs.

Order accordingly.

HENG YEOW HUA v. TAN YEW LAI & SONS SDN. BHD.

[A.C.J. (Hashim Yeop A. Sani J.) October 16, 1981]
[Kuala Lumpur — Civil Appeal No. 60 of 1980]

Contract — Sale and purchase agreement relating to land — Dispute over interest overdue — Claim by appellant for vacant possession — Relief granted by President of Sessions Court — Whether order amounted to rescission.

Jurisdiction — Sessions Court — Immovable property — Whether Sessions Court can hear suit for recovery of immovable property.

The plaintiff claimed against the defendant for vacant possession and mesne profits as from the date of the purported termination of the agreement. The plaintiff was a housing developer and the agreement between the parties was admittedly a sale agreement in respect of a house and described as such in the agreement itself. The said agreement was entered into in February 1975. Purchase price of the house was $39,500. It was completed in March 1976 and possession was given to the appellant also in March 1976. The sessions court found that 35 instalments were made for the period between May 29, 1976 to September 22, 1978. There was protracted correspondence between the parties over the disputed interest overdue. When finally no payment was made on the sums overdue, the plaintiff sent a letter terminating the agreement to the defendant, giving him notice to quit on or before February 28, 1979.

The defendant appealed against the learned President's decision. The Memorandum of Appeal raised the following questions of law for the appellate court:—

(1) Did the Order of the learned President amount to a rescission order?

(2) Was the respondent duplicating his claims in that having elected to charge interest for late payments according to the agreement and having received and taken interest over the years could he then ask for an alternative remedy contradictory to his election?

(3) Was there an infringement of any provisions of the National Land Code and the Moneylenders' Ordinance 1951?

(4) Did the Sessions Court have jurisdiction to hear the suit as the appellant alleged that an issue of title was involved?

Held, dismissing the appeal: (1) as regards question (1), the relief granted by the President was the main relief asked for in the Statement of Claim. It was not an order for rescission and could not be construed as such;

(2) as regards question (2) the principle that a party may not approbate and reprobate has no application on the facts of the case;

(3) as regards question (3) nowhere was this argument raised during the hearing before the learned President nor was it stated anywhere in the pleadings; the court would therefore not consider this point at all;

(4) as regards question (4), a Sessions Court can hear and determine any action or suit for recovery of immovable property so long as the title to the property is not in issue;

(5) there was no reason to interfere with the order of the learned President;

Cases referred to:-

(1) *Hiew Kim Swee* v. *G.C. Gomez* [1955] M.L.J. 170, 172.

(2) *Ali Mat bin Khamis* v. *Jamaliah binti Kassim* [1974] 1 M.L.J. 18.

CIVIL APPEAL.

J.G. Bernatt for the applicant.

Jennifer Chong (Miss) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J. (delivering oral judgment): The plaintiff (respondent now) was claiming for vacant possession and mesne profits as from the date of the purported termination of the agreement (P1). The plaintiff was a housing developer and the agreement between the parties was admittedly a sale agreement in respect of a house and described as such in the agreement itself. The learned President saw it clearly as an agreement for the sale of house No. 297, Taman Dato Tan Yew Lai, Kuala Lumpur. In fact from their pleadings the parties themselves throughout treated the agreement as such and the terms and conditions of sale of the house was as agreed upon by the plaintiff and the defendant.

The agreement was entered into in February 1975. Purchase price agreed to was $39,500. The house was completed in March 1976 and possession given to appellant presumably also in March 1976. Apparently payments were made for about 2 years but not as

regularly as stipulated in the agreement. The last payment was made in July 1978. Since then no payments were made. Notice (P4) was sent to the appellant to deliver vacant possession on or before February 28, 1979.

Clause 4.02 of P1 deals with the mode of progress payments amounting to $17,500 of the purchase price. It says that each payment would be due upon furnishing the requisite notice and architect's certificate stating that so much of the construction had been completed. The learned President dealt satisfactorily with the issue of the requisite notices and the certificates raised by the defendant. The balance of $22,000 of the purchase price was to be paid by regular instalments for 120 months. The learned President found that in all 35 instalments had been made for the period May 29, 1976 to September 22, 1978. From the facts of the case the learned President also found that the defendant had acquiesced to the non-compliance of certain requirements of P1.

It would appear from the evidence as well as the grounds of judgment that there was a protracted and heated correspondence between the parties over the disputed interest overdue — see P14, P15 and D20. When finally no payment was made on the sums overdue the letter terminating the agreement was sent to the defendant and giving him notice to quit on or before February 28, 1979.

The Memorandum of Appeal raises some minor issues of fact but the main questions of law are: —

(1) Does the Order of the learned President amount to a rescission order?

(2) Is respondent duplicating his claims in that having elected to charge interest for late payments according to the agreement and having received and taken interest over the years can he now ask for an alternative remedy contradictory to his election?

(3) Was there an infringement of any provisions of the National Land Code 1965 and the Moneylenders' Ordinance 1951?

(4) Did the Sessions Court have jurisdiction to hear the suit as the appellant alleged that an issue of title was involved?

As regards question (1) it is to be observed that the claim of the respondent (plaintiff before the learned President) was simply for vacant possession and mesne profits. It is a remedy provided by the agreement executed between the parties. Although it does seem odd that the respondent, who admittedly was a housing developer at the material time and the agreement was executed as a sale agreement, the agreement also purports to be a loan agreement. No objection on the nature of the agreement was however raised on behalf of the appellant at any stage of the proceeding. The relief granted by the President was in any case the main relief asked for in the statement of claim. It is not an order for rescission and cannot be construed as such. In any case at the conclusion of hearing of the appeal counsel for appellant stated that he was waiving this ground.

As regards question (2) the law on election as to the proper remedy by a plaintiff is settled. The principle that a person may not "approbate and reprobate" is according to *Halsbury's* a type of estoppel intermediate between "estoppel by record" and "estoppel in pais". The principle is that a party may not "approbrate and reprobate" and this expresses two propositions namely (1) the person having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile and (2) the person will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the choice of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent. Thus a plaintiff having two inconsistent claims who elects to abandon one and pursue the other may not, in general, afterwards choose to return to the former claim and sue on it, but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them.

Where a plaintiff merely claims alternative reliefs, the general rule is that he can elect at the trial but where relief is asked on footings which are inconsistent (for example damages on the basis of a contract having been repudiated and a declaration on the basis that the contract is subsisting) the plaintiff should be put to his election at the trial. This principle has no application on the facts of this case.

As regards question (3) it is observed that no where was this argument raised during the hearing before the learned President nor was it stated anywhere in the pleadings. The statement of defence merely denies any default (without good cause) by the appellant. What was disputed was the effectiveness of notices P2 etc. on the grounds that the proviso to clause 4.02 of P1 had not been complied with. This was another ground which counsel for appellant stated he was waiving at the conclusion of the hearing of the appeal. For these reasons I do not wish to consider this point at all.

The appellant during argument here also raises the question of jurisdiction as it was contended that there was an issue of title. The rule for the courts to follow on the question where there is *bona fide* issue of title involved is well set out in *Hiew Kim Swee* v. *G.C. Gomez*[1] where Thomson J. (as he then was) said: —

"On the other hand, where proceedings were taken for possession under section 122 of the 1846 Act (or the later corresponding sections) it was held, again from the very commencement, that where a defence was raised which on the face of it would raise a question of title it was the duty of the judge to inquire into the facts upon which such a defence was based. That was decided in 1848 in the case of *In re Fearon* v. *Nowall*, (1848) 17 L.J.Q.B. 161."

In *Ali Mat bin Khamis* v. *Jamaliah binti Kassim*[2] the question of ownership of property was raised in the defence thereby bringing out the question of title which took the matter outside the jurisdiction of the Subordinate Court. This is not the case here. A Sessions Court can hear and determine any action or suit for recovery of immovable property so long as the title to the property is not in issue.

Thus my answers to all the four questions raised are against the appellant. As regards questions of fact I find nothing to justify interference as the findings of fact were clearly made by the trial court.

There appears at the end of the judgment of the learned President that counsel for the plaintiff "undertook to refund to defendant any sum outstanding after judgment had been satisfied." The respondent sought during argument to remove that part of the learned President's order on the grounds simply that the relief was never asked for in the statement of claim.

One of the underlying objectives in rules of procedure is to avoid unnecessary duplication of suits and/or proceedings. Therefore courts in every cause or matter pending before them should grant all such remedies as appear to be necessary and to which the party would appear entitled in respect of any legal or equitable claim so that the objective is achieved by having the controversy between the parties completely and finally determined.

True I find some of the provisions of the agreement peculiar. Although it is a sale agreement the title of the property remained throughout with the developer. Under clause 6.02 of P1 the plaintiff (respondent now) would not transfer the title to the appellant until after all payments have been made. Provisions under the miscellaneous part of P1 deal with late payments, interest charges, defaults and vacant possession and forfeiture of all moneys paid. But it is settled law that when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound by the terms. In this case the defendant had signed the agreement knowing fully well that it is a contract for purchase of the house and provisions of the agreement dealt substantially with the modes of payment. It is always implied that the court has the discretion to add to the reliefs prayed for any relief which in its opinion is fair and just and warranted by the circumstances of the case. It is also clear from the notes as well as from the grounds of decision of the learned President that there was an undertaking by counsel for the plaintiff then. I do not think I should interfere with an order consequent upon an undertaking made before another court the terms of which I am not fully familiar with. Furthermore, there is also no cross appeal against this part of the order of the learned President.

The appeal is therefore dismissed with costs and the order of the learned President is affirmed.

Appeal dismissed.

Solicitors: *Baharuddin, Bernatt, Tan & Ker; Mah Kok & Din.*

PUBLIC PROSECUTOR v. ABANG ABDUL RAHMAN

[A.Cr.J. (Tan Chiaw Thong J.) October 19, 1981]
[Sri Aman — Criminal Appeal No. SG. 1 of 1980]

Criminal Law and Procedure — Corruption — Acquittal by lower court — Prosecution witnesses not cross-examined — Failure of trial magistrate to state reasons for findings in judgment — Acquittal order set aside.

The respondent was charged in the lower court under section 4(c) of the Prevention of Corruption Act. He was the Secretary of the Kalaka District Council, and had applied for leave and for free passages to visit Semenanjung Malaysia during his leave. Both were granted to the respondent. The prosecution alleged that he did not make use of the free passages granted because no air tickets had in fact been bought by him or on his behalf. Hence, in certifying the payment voucher (Ex. p. 6) that he had lost all the relevant air tickets issued to him at a cost of $1,264.00 he had knowingly used Ex. P. 6 with intent to deceive, his principal, the Kalaka District Council in that Ex. P. 6 contained false material particulars, namely that the said sum had been incurred by him and his family when they had not been so incurred.

The case for the defence was that the air tickets had been bought by the respondent through Chop Thong Hwa, a shop which sometimes obtained air tickets on behalf of others from Sin Hua Travel Agent, Sibu. While in the course of making preparations in Kuching to visit Kuala Lumpur with his family, the respondent received news that one of his children was ill and he had to rush back to his house during the course of which he lost the air tickets. Hence, in certifying this in Ex. P. 6 he was merely certifying a fact, and, the cost of the air tickets having been incurred by him and his family, he had not committed the offence charged against him. The learned trial magistrate acquitted the accused of the said charge. The prosecution appealed.

Held, allowing the appeal: (1) an appellate court can interfere with a finding based on inference; an appellate court before reaching its conclusions upon matters of fact, should and will always give proper weight and consideration to such matters as (a) the views of the trial judge as to the credibility of the witnesses; (b) the presumption of innocence in favour of the accused; (c) the right of the accused to the benefit of any doubt; and (d) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses;

(2) in the light of the conflicting evidence on material matters in the respective testimonies of PW5, PW6 and the respondent, the learned trial magistrate could not have been in a position to properly weigh the evidence of PW5 and PW6 against that of the respondent particularly on such material matters, as he seemed to have done. This material defect in the judgment of the lower court made it unsound and was sufficient to cast doubt on its correctness and reliability, and justified the setting aside of the order of acquittal of the lower court;

(3) a magistrate should discuss the evidence and the probabilities arising from the circumstances of the case. The reasons for his findings should be stated. The grounds should indicate that he had in fact applied his mind to the evidence produced in the case. In the present case the learned trial magistrate had not adequately done that in his judgment, rendering it defective.

Cases referred to:-

(1) *Wong Swee Chin* v. *Public Prosecutor* [1981] 1 M.L.J. 212.

(2) *Re Pichi Muthu* [1970] 2 M.L.J. 143.

(3) *Public Prosecutor* v. *Mohamed Isa bin Awang & Anor.* Kedah Criminal Trial No. 26 of 1978. *(unreported).*

(4) *Chua Beow Huat* v. *Public Prosecutor* [1970] 2 M.L.J. 29.

(5) *A.E.G. Carapiet* v. *A.Y. Derderian* A.I.R. 1961 Cal. 359.

(6) *Sheo Swarup* v. *King Emperor* A.I.R. 1934 P.C. 227.